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Comment/Right to Counsel and the Serviceman

*"... never have we held that all the rights covered by the Fifth and the Sixth Amendments were abrogated by Art. I, §8, cl. 14 of the Constitution, empowering Congress to make rules for the armed forces."*¹

THE ARGUMENT that the men and women of the Armed Services are to be afforded the constitutional safeguards guaranteed to all citizens by the Bill of Rights has been made on historical, judicial, and legislative fronts. Perhaps the argument is academic, for regardless of whether Congress, in exercising its power to regulate the military services, is or is not limited by the Bill of Rights, it is more than clear that all concerned with military justice have been successful in their efforts to assure military personnel basic protections of a civilized society—whether by legislative enactment, judicial decree, or administrative practice.

Yet, it is unclear whether the protection of assistance of counsel for military personnel has its foundation in the sixth amendment "right to assistance of counsel."² Two recent federal district court opinions³ and legislation⁴ pending in Congress raise anew certain questions: Does the constitutional "right to assistance of counsel" apply to military tribunals? If this right does apply, is legal counsel required or will military counsel suffice? Finally, will practical considerations permit effective application of the right?

Before attempting to resolve the questions, a discussion of the two cases and pending legislation, in view of the history and judicial and legislative activities relating to right to counsel for servicemen, is desirable.

JUDICIAL ACTIVITY

Any analysis of right to counsel in relation to military tribunals must be made with respect to the broader consideration of whether the Founding Fathers understood the power of Congress to make "rules for the government and regulation of the land and naval forces"⁵ to be limited by the pro-

¹ Mr. Justice Douglas, in *Burns v. Wilson*, 346 U.S. 137, 152 (1953) (dissenting opinion).

² U.S. CONST. amend. VI.

³ Application of Stapley, 246 F. Supp. 316 (D. Utah 1965); *LeBallister v. Warden*, 247 F. Supp. 349 (D. Kans. 1965).

⁴ S. 750, 89th Cong., 1st Sess. (1965).

⁵ U.S. CONST. art. I, § 8, cl. 14.

tections guaranteed all citizens through the Bill of Rights. The only express limitation in the Bill of Rights is that servicemen, unlike civilians, are not entitled to a grand jury indictment.⁶ The absence of any distinction between servicemen and civilians concerning the right to counsel has necessitated inquiry into the intentions of the Founding Fathers and examination of the practices prevalent in military tribunals at the time the Bill of Rights was adopted.

An eloquent plea has been made that the original understanding was that the sixth amendment applied to military tribunals.⁷ However, the stronger historical case⁸ demonstrates that the early Congresses and some of the principal draftsmen of the Bill of Rights did not consider the Bill applicable to military personnel⁹ and that the sixth amendment right to counsel "was never thought or intended or considered, by those who drafted the sixth amendment or by those who lived contemporaneously with its adoption, to apply to prosecutions before courts martial."¹⁰

The historical debate as to the extent of Congress' power or any limita-

⁶ U.S. CONST. amend. V.

⁷ Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957).

⁸ Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pts. 1-2), 72 HARV. L. REV. 1, 266 (1958) (hereinafter cited as Wiener I and Wiener II). Mr. Wiener's article was a rebuttal of Mr. Henderson's historical examination and conclusion.

⁹ The 1806 Articles of War, the first comprehensive code enacted for the army under the constitution, limited a soldier's exercise of free speech. This included, among other specific limitations, the use of "contemptuous or disrespectful words" in reference to the President, Vice-President or Congress of the United States. Act of April 10, 1806, ch. 20, art. 5, 2 Stat. 359, 360 (hereinafter referred to as the 1806 Articles of War). This article was signed into law by President Jefferson, who, a few years earlier, had led a first amendment attack on similar free speech prohibitions which were applied to civilians by the Sedition Act of 1789. Act of July 14, 1789, ch. 75, 1 Stat. 596.

¹⁰ Wiener I at 49. The 1806 Articles of War contained no specific provision for defense counsel for an accused before a military tribunal. Article 69, 2 Stat. 359, 367-368, provided that the presiding judge advocate at a court-martial should prosecute for the United States and also, in a limited sense, act as counsel for the accused after he pleaded, *i.e.*, the judge advocate could object to leading questions asked of witnesses or incriminating questions of the defendant. In early practice, professional lawyers were not permitted to interfere in courts-martial proceedings by pleading or argument of any kind. A serviceman, however, was permitted to receive informal advice or assistance from counsel. See Wiener I at 22-24.

The circumstances of one of the earliest court-martial trials, indicating that the principal draftsman of the Bill of Rights, James Madison, did not consider the sixth amendment right to counsel applicable to military tribunals, are recounted in Wiener I at 29-31. When Brigadier General William Hull was tried in 1814 for having surrendered Detroit to the enemy in the war of 1812 without firing a shot, he requested that his legal advisers be permitted to address the court and examine witnesses:

I appeal to the constitution of our country; and if you do not find my claim sanctioned by the letter of that instrument, I am sure you will by its spirit, which I know must govern the deliberations and decisions of this honourable court . . . when it was provided that the accused should have the benefit of counsel, how can it be supposed that it was intended to confine this provision to accusations before a civil court. The court-martial ruled that counsel could not address the court personally and sentenced the General to death with a recommendation of clemency. Under contemporary procedure the decision was reviewed by President Madison, who approved the sentence.

tions on this power notwithstanding, the Constitution clearly vests in Congress the power to control and regulate the military establishment.¹¹ At an early date, the Supreme Court recognized that Congress' power to provide for administration of discipline in the Armed Services by means of military tribunals was entirely independent of and had no connection with its power to establish civilian courts under article III.¹² This separation of civilian and military courts was essential, for

if it were otherwise, the civil courts would virtually administer the rules and articles, irrespectively of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.¹³

However, the Court added that

if a court-martial has no *jurisdiction over the subject matter of the charge . . .*, or shall inflict a punishment *forbidden by the law*, through its sentence shall be approved by the officers having a revisory power of it, *civil courts* may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress. (Emphasis in the original.)¹⁴

Though Congress could and did provide for courts-martial and disciplinary tribunals,¹⁵ article III courts were not completely precluded from reviewing courts-martial proceedings, and a convicted serviceman, by means of a writ of habeas corpus, could, in a civilian court, collaterally attack the jurisdiction of the court-martial rendering his conviction.¹⁶ The civilian court's inquiry was originally limited to the considerations of whether the court-martial had been properly constituted, had jurisdiction over the accused

¹¹ The War Powers of Congress are contained in U.S. CONST. Art. I, § 8, cls. 11-14.

¹² *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857).

¹³ *Id.* at 82.

¹⁴ *Id.* at 82-83.

¹⁵ See, e.g., Act of March 2, 1799, ch. 24, arts. 47-48, 1 Stat. 709, 713; Act of April 23, 1800, ch. 33, § 1, arts. 33-41, 2 Stat. 45, 50-51; and see generally 1806 Articles of War, 2 Stat. 359.

¹⁶ *Ex parte Reed*, 100 U.S. 13 (1879). This was the first habeas corpus proceeding before the Supreme Court growing out of a court-martial conviction of a soldier. The Court had previously dealt with habeas corpus applications in the cases of military commission prisoners who were civilians. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868). The Court had earlier held that it lacked jurisdiction to review by certiorari the proceedings of a military commission. *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863). In *Reed*, the Court stated that "a writ of habeas corpus cannot be made to perform the function of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void." *Ex parte Reed*, *supra* at 23. This position was reaffirmed in 1902 when the Court approved the "salutary rule that the sentences of courts-martial, when affirmed by the military tribunal of last resort, cannot be revised by the civil courts save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed." *Carter v. McClaghry*, 183 U.S. 365, 401 (1902). See generally Wurfel, *Military Habeas Corpus*, 49 MICH. L. REV. 493, 515-519 (1951).

and the charge, imposed a sentence within its power, and afforded the accused the military appellate review granted by statute.¹⁷

The civilian court's collateral review then expanded into a concept of divestiture of jurisdiction whereby, upon a realization that justice was not served in a court-martial proceeding, a civilian court could rule, upon a habeas corpus application, that a series of errors at trial divested the court-martial of the jurisdiction possessed at the initiation of the proceedings.¹⁸ This expansion of the review of military convictions by civilian courts paralleled the expansion of review of civilian habeas corpus applications.¹⁹

In 1953, the Supreme Court attempted to clarify the position to be taken by a federal court when it undertakes a habeas corpus review of a military conviction.²⁰ Still recognizing military law as separate and distinct,²¹ the Court stated that military courts have a responsibility to protect the constitutional rights of an accused.²² The Court concluded that, though Congress

¹⁷ See Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127, 130 n.33 (1964). This traditional view was thought to be positively reaffirmed by the Supreme Court in 1950. See *Hiatt v. Brown*, 339 U.S. 103, 111 (1950). But see *Burns v. Wilson*, *supra* note 1, discussed *infra*.

¹⁸ This approach was first used by a federal court in *Schita v. King*, 133 F.2d 283 (8th Cir. 1943), *denial of writ on remand upheld sub nom. Schita v. Cox*, 139 F.2d 971 (8th Cir. 1944), *cert. denied*, 322 U.S. 761 (1944). In this case, the petitioner complained that he had been denied a fair and impartial trial by the sentencing court-martial, including the allegation that he had received ineffective assistance of counsel at the court-martial trial. The court stated that the accused's allegations, if uncontroverted, resulted in a denial of due process and rendered the tribunal without jurisdiction to impose sentence and conviction.

The most cogent statement of the new approach appeared in *United States ex rel. Innes v. Hiatt*, 141 F.2d 664 (3d Cir. 1944). After asserting its power to grant the relief sought on review of a court-martial conviction for constitutional due process deficiencies, the court denied the writ, but stated that the "basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. . . . As to them [military defendants before court-martials] due process of law means the application of the procedure of the military law but the due process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way. We conclude that it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances of a court-martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process of law and, if it so finds, to declare that the relator had been deprived of his liberty in violation of the fifth amendment and to discharge him from custody." *Id.* at 666. See also *Anthony v. Hunter*, 71 F. Supp. 823 (D. Kans. 1947); *Hicks v. Hiatt*, 64 F. Supp. 238 (M.D. Pa. 1946).

However, the Supreme Court subsequently held that it was error for a circuit court of appeals to extend its review of a military conviction "to such matters as the propositions set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pre-trial investigation, and the competency of the law member and defense counsel," for the purpose of establishing compliance with the due process clause. *Hiatt v. Brown*, *supra* note 17, at 110.

¹⁹ *Johnson v. Zerbst*, 304 U.S. 458, 467-468 (1938). It was on the springboard of this authority that the federal courts began a wider review of courts-martial convictions, on the assumption that the expanded concept of divestiture of jurisdiction was "a fortiori" applicable to the military courts. See *Anthony v. Hunter*, *supra* note 18, at 826.

²⁰ *Burns v. Wilson*, *supra* note 1.

²¹ *Id.* at 140. "This Court has played no role in its (*i.e.*, military law) development; we have exerted no supervisory power over the courts which enforce it."

²² *Id.* at 142.

had provided that military tribunal determinations were "final" and "binding"²³ upon all courts, such provision did not displace a civilian court's jurisdiction of a habeas corpus application from a military prisoner.²⁴ In essence, the "finality" of a court-martial decision meant only that if the allegations raised in the writ have been fully and fairly considered in the military tribunal, a federal court is not free to grant the writ merely to re-evaluate the evidence.²⁵ Rather, the civilian court's review was limited to a determination of whether the military tribunal had given fair consideration to any claim of constitutional unfairness or deprivation of right.²⁶

It has been suggested by the Supreme Court that Congress, in making rules and regulations for the Armed Services, is not limited by the Bill of Rights.²⁷ However, the development of civilian court review of court-martial convictions precludes the absolute acceptance of this suggestion. The due process concepts stated in *United States ex rel. Innes v. Hiatt*²⁸ and *Burns v. Wilson*²⁹ indicate that a serviceman on trial before a military tribunal is at least guaranteed by the fifth amendment a fundamentally fair application of the provisions of military law. These concepts have found their most recent expansion in the pronouncements of the Court of Military Appeals³⁰ and its treatment of a serviceman's right to legal counsel. Before discussing this court's views on the right to counsel and the serviceman, attention must be directed momentarily to legislative activity in this area.

LEGISLATIVE ACTIVITY

While judicial activity provided assurances to those in military service of necessary protections of a civilized society, Congress also exercised its legislative

²³ See, e.g., Act of June 24, 1948, ch. 625, art. 50 (h), 62 Stat. 604, 637-638.

²⁴ *Burns v. Wilson*, *supra* note 1, at 142.

²⁵ *Ibid.* The impact of the *Burns* decision on a federal court's scope of collateral review of military convictions appears uncertain. One view of the decision sees it as establishing the proposition that once Congress has legislatively struck a balance between a serviceman's constitutional rights and military necessity, the federal courts are precluded from questioning this balance. Note, *Constitutional Rights of Servicemen Before Courts-Martial*, *supra* note 17, at 146-147. This view would not find *Burns* inconsistent with *Hiatt v. Brown*, *supra* note 17. Chief Justice Warren, however, gives a broader interpretation to *Burns*, i.e., that "soldiers may not be stripped of basic rights simply because they have doffed their civilian clothes." Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

²⁶ For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on affixing guilt by dispensing with rudimentary fairness rather than finding truth by adhering to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts. *Burns v. Wilson*, *supra* note 1, at 142-143.

²⁷ See, e.g., *Ex parte Milligan*, *supra* note 16, at 138 (concurring opinion): "The power of Congress, in the government of land and naval forces and of the militia, is not at all affected by the fifth or any other amendment."

²⁸ *Supra* note 18.

²⁹ *Supra* note 1.

³⁰ See 10 U.S.C. § 867 (1964), which provides for the establishment of the United States Court of Military Appeals and defines its structure and responsibility.

powers to aid in the struggle for the protection of military personnel. Military discipline was governed by the Articles of War, enacted in 1806.³¹ Revised in 1916³² and in 1920,³³ the Articles of War left much to be desired in providing procedural due process for an accused before a military tribunal.³⁴ Public dissatisfaction with alleged military injustice during World War II³⁵ resulted in the enactment of the Uniform Code of Military Justice (UCMJ)³⁶—a comprehensive scheme of legislation designed to protect the rights of those persons subject to military justice.

That the UCMJ has been successful cannot be denied.³⁷ Indeed, it has been said that, in some instances, military personnel receive greater protection under the UCMJ than do their civilian counterparts under state or federal law.³⁸ In addition to the provisions for counsel, discussed below, Congress has, through the UCMJ, assured military personnel many constitutional and procedural safeguards similar to those afforded civilians.³⁹

To cite but a few examples, self-incrimination,⁴⁰ cruel and unusual punishment,⁴¹ double jeopardy,⁴² and command influence on court-martial personnel⁴³ are prohibited. The accused may challenge members of both general and special courts-martial for cause and peremptorily, and the law offi-

³¹ 1806 Articles of War, arts. 1-101, 2 Stat. 359 (1806) (repealed by the UCMJ).

³² Act of Aug. 29, 1916, ch. 418, arts. 1-121, 39 Stat. 650. The revisions "were only a rearrangement and reclassification without much alteration in substance." Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953).

³³ Act of June 4, 1920, ch. 227, arts. 1-121, 41 Stat. 787. The revisions embodied some "provisions protecting the rights of an accused." Morgan, *supra* note 32, at 172.

³⁴ See Morgan, *supra* note 32, at 169-182.

³⁵ See especially White, *The Uniform Code of Military Justice: The Background and the Problem*, 35 ST. JOHN'S L. REV. 197, 198-209 (1961).

³⁶ Ch. 169, 64 Stat. 107 (1950), as amended, 10 U.S.C. §§ 801-940 (1964).

³⁷ John S. Stillman, National Chairman of the American Veterans Committee, testifying before the Senate Subcommittee on Constitutional Rights (hereinafter referred to as subcommittee), stated: "Blackstone at one time referred to the English soldier as being 'in a state of servitude in the midst of a nation of free men'. We have no such stark contrast today, thanks largely to the adoption in 1950 of the Uniform Code of Military Justice." *Transcript of Hearings Before the Senate Subcommittee on Constitutional Rights and a Special Subcommittee of the Senate Armed Services Committee in Joint Hearings on Military Justice and Military Discharges*, 89th Cong., 1st Sess. 404 (1966) (hereinafter cited as *Transcript: 1966 Hearings*); see, also, Statement of the Honorable Paul J. Kilday, Judge, United States Court of Military Appeals, *Transcript: 1966 Hearings* 608. For an early evaluation of the UCMJ, see Ward, *UCMJ—Does It Work?*, 6 VAND. L. REV. 186 (1953).

³⁸ Brigadier General Kenneth J. Hodson, Assistant Judge Advocate General for Military Justice, Department of the Army, testifying before the subcommittee, stated: "In many respects, members of the armed forces charged with criminal offenses are now accorded more legal safeguards than members of the civilian community in similar circumstances. The present requirements for legal representation of the military accused before and during trial in general court-martial cases and upon the automatic appellate review of those cases are examples." *Transcript: 1966 Hearings* 37-38.

³⁹ See Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1960).

⁴⁰ 10 U.S.C. § 831 (1964).

⁴¹ 10 U.S.C. § 855 (1964).

⁴² 10 U.S.C. § 844 (1964).

⁴³ 10 U.S.C. § 837 (1964).

cer for cause.⁴⁴ The accused has the opportunity to obtain witnesses and evidence and to compel the appearance and testimony of witnesses and the production of evidence.⁴⁵ Furthermore, the UCMJ furnishes an extensive system of appellate review.⁴⁶ All courts-martial are automatically reviewed by the convening officer and a member of the Judge Advocate General's Office.⁴⁷ Certain convictions must be reviewed by the service Board of Review⁴⁸ and by the Court of Military Appeals.⁴⁹ The accused is entitled to legally qualified counsel before both the Board of Review and the Court of Military Appeals.⁵⁰

Concerning right to counsel, the UCMJ presently requires that trial counsel (analogous to the prosecution)⁵¹ and defense counsel be detailed for each general and special court-martial.⁵² An accused is permitted to retain civilian counsel, at his own expense, for either a general or special court-martial.⁵³ It is important to note that the term "counsel", as used in the UCMJ, does not necessarily refer to legally qualified counsel. Unless counsel is defined as Article 27 (b) counsel, it is understood that military, or non-legal counsel, is intended.⁵⁴

For a general court-martial, which has jurisdiction to try all persons and offenses subject to the UCMJ and which can adjudge any sentence, including death,⁵⁵ the law officer (analogous to the judge),⁵⁶ the trial counsel, and the defense counsel must be qualified attorneys.⁵⁷ For a special court-martial, which has jurisdiction to try all persons and noncapital offenses,⁵⁸ but which is limited to adjudging sentences of a maximum of six months confinement, a bad conduct discharge, and lesser penalties,⁵⁹ the accused is not entitled to a qualified attorney as defense counsel unless the trial counsel is a qualified attorney.⁶⁰ There is no provision for a law officer at a special court-martial.⁶¹ For a summary court-martial, which has jurisdiction to try

⁴⁴ 10 U.S.C. § 841 (1964).

⁴⁵ 10 U.S.C. §§ 846-47 (1964).

⁴⁶ 10 U.S.C. §§ 859-76 (1964).

⁴⁷ 10 U.S.C. §§ 860-65 (1964).

⁴⁸ 10 U.S.C. § 866 (b) (1964).

⁴⁹ 10 U.S.C. § 867 (b) (1964).

⁵⁰ 10 U.S.C. § 870 (1964).

⁵¹ 10 U.S.C. § 838 (1964).

⁵² 10 U.S.C. § 827 (a) (1964).

⁵³ 10 U.S.C. § 838 (b) (1964).

⁵⁴ 10 U.S.C. § 827 (b) (1964).

⁵⁵ 10 U.S.C. § 818 (1964).

⁵⁶ 10 U.S.C. §§ 826-27 (1964).

⁵⁷ 10 U.S.C. §§ 839, 851 (b) (1964).

⁵⁸ 10 U.S.C. § 819 (1964).

⁵⁹ *Ibid.*

⁶⁰ 10 U.S.C. § 827 (c) (1964).

⁶¹ The president of a special court-martial has similar duties as the law officer of a general court-martial. 10 U.S.C. § 851 (1964). However, no member of a special court-martial need be a lawyer. 10 U.S.C. § 816 (2) (1964).

only enlisted personnel and which is limited to adjudging a sentence of a maximum of one month confinement or its equivalent,⁶² there exists no provision for either counsel or law officer.⁶³

In addition to the provisions for legal counsel and the other constitutional and procedural safeguards mentioned above, the military services themselves take care to see that non-legal or military counsel are reasonably prepared in the skill of administering military justice. This is accomplished primarily by instruction in the arts of military justice⁶⁴ and by the use of the *Manual for Courts-Martial*⁶⁵ by court-martial personnel.

It is apparent, then, that "Congress . . . has responded to the challenge of extending the constitutional safeguards, so cherished in civilian life, to the countless thousands of men and women who enter the Armed Services."⁶⁶ It is equally apparent that, while there has been no clear constitutional directive to Congress to afford servicemen the sixth amendment "right to assistance of counsel", much has been done by legislative activity to assure military personnel, under some but not all circumstances, the assistance of counsel, both military and legal. Whether enough has been done is, like all questions relating to the protection of American citizens, open to debate.

Court of Military Appeals

Establishment of the United States Court of Military Appeals by Congress has made that court the primary guardian of servicemen's rights before military tribunals. The court has declared that its duty is to interpret the UCMJ in the light of constitutional protections and that all Bill of Rights guarantees apply to servicemen except those which are expressly or by necessary implication excluded,⁶⁷ reversing its earlier view that the rights of military personnel were determined by the UCMJ and that any conflict between the Code and the Constitution should be resolved in favor of the Code.⁶⁸

How this interpretation of its duty affects the right to counsel, however, is unclear, as shown by the recent decision of *United States v. Culp*.⁶⁹ Though the Court of Military Appeals had previously reserved the right to

⁶² 10 U.S.C. § 820 (1964).

⁶³ 10 U.S.C. §§ 816 (3), 827, 838 (1964).

⁶⁴ See, e.g., [1964] ARMY JAG ANN. REP. 60.

⁶⁵ Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951), prescribing the U.S. DEP'T OF DEFENSE MANUAL FOR COURTS-MARTIAL (1951), pursuant to 10 U.S.C. § 836 (1964).

⁶⁶ Statement of Senator Ervin, 111 CONG. REC. 1227 (daily ed. Jan. 26, 1965).

⁶⁷ *United States v. Jacoby*, 11 U.S.C.M.A. 428, 430-431, 29 C.M.R. 244, 246-247 (1960); see also Warren, *supra* note 25, at 188-190. The Chief Justice considers the UCMJ as the guardian of the Bill of Rights in the military and the Court of Military Appeals as the civilian "Supreme Court" for the military.

⁶⁸ See *United States v. Sutton*, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953), and Quinn, *supra* note 39, at 232. *Sutton* was a logical extension of *United States v. Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951), which based a serviceman's rights on congressional statute.

⁶⁹ 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

pass on the qualifications of officers assigned to defend an accused before courts-martial,⁷⁰ in *Culp*, it was confronted with the determination by a Board of Review that the sixth amendment guaranteed the right to legally qualified counsel to a defendant convicted of larceny at a special court-martial and sentenced a bad conduct discharge.⁷¹ Judge Kilday, writing the opinion of the court, stated that "qualifications of counsel for courts-martial are a matter within the sound discretion of Congress"⁷² and that, in his opinion, the sixth amendment did not apply to court-martial trials.⁷³ Chief Judge Quinn, in a concurring opinion, took the position that the sixth amendment right to counsel applied to courts-martial, but that the appointment of an officer pursuant to Article 27 (c) of the UCMJ fulfills the requirement.⁷⁴ Judge Ferguson, also concurring, agreed that an accused before a court-martial was entitled to the sixth amendment right to counsel but concluded that the defendant was not denied this right since he chose to be represented by the appointed officers.⁷⁵

Implied in the *Culp* decision, therefore, as expressed in the two concurring opinions, is that the sixth amendment directly applies to servicemen in respect to their right to counsel before courts-martial, but that the requirement is met by the appointment of military counsel. Although Chief Judge Quinn questioned the desirability of continuing to permit nonlawyers to practice before tribunals empowered to impose bad conduct discharges,⁷⁶ as did Judge Ferguson,⁷⁷ he was convinced that Congress has the undisputed right to establish the qualifications of counsel appearing before courts-martial⁷⁸ and that "the existing qualifications for counsel before those courts [special courts-martial] are reasonably calculated to insure that appointed counsel possess knowledge of the law normally incident to special court-martial practice."⁷⁹

Thus, the sixth amendment looms in the background of special courts-martial proceedings, and by implication all courts-martial proceedings, but the extent of its application is uncertain.⁸⁰ The *Culp* decision, however, re-

⁷⁰ *United States v. Gardner*, 9 U.S.C.M.A. 48, 25 C.M.R. 310 (1958); *United States v. Fisher*, 8 U.S.C.M.A. 396, 24 C.M.R. 200 (1957); *United States v. Williams*, 8 U.S.C.M.A. 443, 24 C.M.R. 253 (1957). See generally Avins, *Accused's Rights to Defense Counsel Before a Military Court*, 42 U. DET. L.J. 21 (1964).

⁷¹ *United States v. Culp*, *supra* note 69, at 218, 33 C.M.R. at 413.

⁷² *Id.* at 216, 33 C.M.R. at 428.

⁷³ *Ibid.*

⁷⁴ *Id.* at 217, 33 C.M.R. at 429.

⁷⁵ *Id.* at 219, 33 C.M.R. at 431.

⁷⁶ *Id.* at 218, 33 C.M.R. at 430.

⁷⁷ *Id.* at 219-221, 33 C.M.R. at 431-433.

⁷⁸ *Id.* at 217, 33 C.M.R. at 429.

⁷⁹ *Id.* at 218, 33 C.M.R. at 430.

⁸⁰ The *Culp* decision has been interpreted as setting up a double standard of constitutional rights, one for civilians and one for servicemen, indicating that "civilian due process" and "military due process" are not the same. See 49 VA. L. REV. 1581, 1587-1588 (1963). See also Quinn, *supra* note 39, at 233.

veals a willingness on the part of the courts to relate the constitutional "right to assistance of counsel" to the fundamental fairness or military due process to which servicemen standing before courts-martial are entitled—a willingness short, though, of direct application of the sixth amendment provision in all its force.

THE RECENT CASES:

Application of Stapley; LeBallister v. Warden

Almost without exception,⁸¹ it has been held in the federal courts that the due process guarantee of the fifth amendment and the right to counsel guarantee of the sixth amendment do not require that an accused before a court-martial be represented by legally qualified counsel.⁸² Generally, where the sixth amendment has been held to apply, the requirement is satisfied if defense counsel is a commissioned officer admitted to practice before courts-martial.⁸³

*Application of Stapley*⁸⁴ and *LeBallister v. Warden*⁸⁵ demonstrate that confusion and doubt continue to affect servicemen's right to counsel before special courts-martial. In *Stapley* the petitioner brought a writ of habeas corpus to secure his release from custody after being sentenced to confinement for three months, a forfeit of two-thirds pay for six months and a demotion.⁸⁶ He had been charged with breaches of military orders and discipline and with writing bad checks.⁸⁷ *Stapley* had been tried by a special court-martial and his request for the appointment of a lawyer as defense counsel had been denied.⁸⁸ Financially unable to secure a civilian lawyer,⁸⁹ he was

⁸¹ One of the exceptions is *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Cl. 1947), in which a military conviction was voided, on the basis of the sixth amendment, because the accused was denied adequate assistance of counsel. Even in *Shapiro*, the circumstances were such that the judge characterized the proceedings as an example of "military despotism." *Id.* at 207. *Shapiro* also demonstrates an alternative form of attacking a military conviction collaterally in a civilian court, *i.e.*, by suit in the Court of Claims to recover a fine or forfeiture, in this case back pay, assessed by the court-martial. This method of attack dates back to *Swaim v. United States*, 165 U.S. 553 (1897). Another method of attacking a military conviction is shown by *Jackson v. McElroy*, 163 F. Supp. 257 (D.D.C. 1958), where the court held that the jurisdiction of the convicting court-martial could be reviewed in an action for a declaratory judgment under 28 U.S.C. § 2201 (1964), wherein the petitioner contends that his conviction and sentence are void and requests a mandatory injunction under 28 U.S.C. § 1361 (1964) to remove the discharge. Recently, the Court of Appeals for the First Circuit approved this method of attack. *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965).

⁸² *Ex parte Benton*, 63 F. Supp. 808 (N.D. Cal. 1945); *Duval v. Humphrey*, 83 F. Supp. 457 (M.D. Pa. 1949); *Adams v. Hiatt*, 79 F. Supp. 433 (M.D. Pa. 1948), *cert. denied*, 337 U.S. 946 (1949); *Smith v. Hiatt*, 170 F.2d 61 (3rd Cir. 1948).

⁸³ *Romero v. Squier*, 133 F.2d 528 (9th Cir. 1943), *cert. denied*, 318 U.S. 785 (1943); *accord*, *Altmayer v. Sanford*, 148 F.2d 161 (5th Cir. 1945).

⁸⁴ 246 F. Supp. 316 (D. Utah 1965).

⁸⁵ 247 F. Supp. 349 (D. Kans. 1965).

⁸⁶ *Application of Stapley*, *supra* note 84, at 320.

⁸⁷ *Id.* at 318.

⁸⁸ *Ibid.*

⁸⁹ *Id.* at 319.

assigned military defense counsel with no legal training and no experience in court-martial proceedings.⁹⁰ Under the advice of his assigned counsel, Stapley pleaded guilty to all charges and settled for a prior arranged "deal" which his advisors had worked out with the commanding officer whereby he would only receive two months confinement at the most.⁹¹

District Judge Christensen found that defense counsel "were wholly unqualified to act as 'counsel' with respect to military law, procedure, trial or defense practicality, or at all,"⁹² and that the court-martial trial "notwithstanding that all participants acted in good faith, constituted no more than idle ceremony or form in accordance with a script arranged beforehand, and limited and determined by defense counsel."⁹³ Consistent with these findings, Judge Christensen concluded that petitioner was entitled to his release and granted the writ of habeas corpus.⁹⁴

In reaching this result, Judge Christensen concluded that the sixth amendment right to counsel applied to proceedings before special courts-martial, "particularly where the charges are substantial or involve moral turpitude or may result in a substantial deprivation of liberty."⁹⁵ However, this apparently broad statement was qualified as follows:

The circumstances of this case render it unnecessary to decide whether before such tribunals under all circumstances an accused is entitled to be represented by counsel who have been trained and admitted to practice before a civilian court. . . . It is sufficient here to consider only whether under the peculiar circumstances of this case, and in view of the frustration of petitioner's efforts to obtain qualified legal services because of his inability to pay them, minimal requirements of due process particularly in view of the Sixth Amendment, required that counsel made available to the petitioner had requisite competency or qualification in military or civilian laws and proceedings . . . beyond that common to every officer in the military service.⁹⁶

Is the analysis in the opinion any different than that of the Court of Military Appeals in similar cases?⁹⁷ Essentially, Judge Christensen has evaluated the factual situation, *i.e.*, the type of crime charged,⁹⁸ the character and emo-

⁹⁰ *Id.* at 318-319.

⁹¹ *Id.* at 319.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Id.* at 322. The writ was granted on the traditional basis of lack of jurisdiction in the court-martial, though by the indirect method of divestiture of jurisdiction, in that Judge Christensen held that the court-martial was without jurisdiction by reason of its violation of the petitioner's constitutional rights of effective assistance of counsel and due process. See notes 18 and 19 *supra* and accompanying text.

⁹⁵ *Id.* at 320.

⁹⁶ *Id.* at 320-321.

⁹⁷ See cases cited note 70 *supra*; but see *infra* note 107.

⁹⁸ Application of Stapley, *supra* note 84, at 318. "[R]epeated acts of claimed fraud in the issuance of checks some of which if established, could have constituted felonies in a civil

tional makeup of the defendant,⁹⁹ the circumstances surrounding the proceedings,¹⁰⁰ the fundamental fairness of the proceedings as a whole,¹⁰¹ and, finally, the qualifications of the assigned counsel to cope with all these factors and give the accused the benefit of an intelligent and competent defense which meets the requirements of the sixth amendment as it applies to military tribunals through a concept of due process.¹⁰²

Such an evaluation determines whether the "minimal requirements of due process and the sixth amendment"¹⁰³ are present. The minimal requirements

are not satisfied by the assignment as counsel to an accused of officers with substantially no experience, training or knowledge in the field of law, either military or civilian . . . it is no longer either reasonable or necessary, if it ever were, to deem any officer qualified to act as defense counsel for an accused merely because he is an officer; nor is it either reasonable or necessary to limit the availability of qualified defense counsel to cases in which the prosecution is represented by qualified counsel.

. . . .

"[M]ilitary due process", while within the competence of Congress to establish in view of military necessity, must comport with minimal requirements of constitutional due process to render it immune from attack in the courts when inconsistent confinement of military personnel is involved.¹⁰⁴

The decision in *Stapley* would not preclude the assignment of non-legal counsel. However, due process will not be satisfied unless the counsel possesses "at least minimal qualifications to rationally advise on substantive and procedural legal problems. . . ."¹⁰⁵ The decision goes further than the ap-

court and all of which imputed moral turpitude. Such charges involve problems of substantive law as well as practice, reasonably necessitating knowledgeable legal counsel, advice and assistance."

⁹⁹ *Ibid.* "Stapley at the time he faced these charges was of the age nineteen years, apparently immature even for his age, suffering from emotional difficulties, and of limited experience."

¹⁰⁰ *Supra* note 89.

¹⁰¹ See notes 91, 93 *supra* and accompanying text.

¹⁰² Application of Stapley, *supra* note 84, at 318-320. The defense counsel and assistant defense counsel were a captain and second lieutenant. The captain was a veterinarian who had been in the service for about two years and had no acquaintance with military court procedures. His total training as an officer in military law had been two days. The second lieutenant was 22 years old and had been in the service for a year. He had a political science background in college and had studied the UCMJ in the ROTC program. He had, however, no practical experience or special knowledge in legal matters or procedure. Judge Christensen found their advice to their client totally ineffectual and incorrect in some instances, *i.e.*, defense counsel's belief that intoxication was no defense for a specific intent crime. Also, counsel advised the defendant to plead guilty to all charges, including one thereafter ordered dismissed by the convening authority for legal insufficiency to state an offense. All these factors led to a conclusion that representation in this case did not constitute in fact or law "representation by 'counsel' either civil or military."

¹⁰³ *Id.* at 321.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

proach advocated by Chief Judge Quinn.¹⁰⁶ While *Stapley* would apply the sixth amendment to special courts-martial, it would not necessarily require appointment of legally qualified counsel. However, appointment of an officer, as presently required by Congress, would not always suffice. Rather, the minimal requirements of due process require a case-by-case examination to determine whether the qualifications of counsel, lawyer or nonlawyer, will enable an accused to have a full and fair consideration of the charges against him consistent with the requirements of fundamental fairness.¹⁰⁷

*LeBallister v. Warden*¹⁰⁸ involved two separate special courts-martial convictions on charges of absence without leave and disobedience of orders,¹⁰⁹ stemming primarily from petitioner's actions in pursuance of his personal beliefs as a conscientious objector.¹¹⁰ These convictions each resulted in confinement for six months and forfeiture of a portion of the petitioner's pay.¹¹¹ LeBallister did not request representation by civilian or military counsel of his own choice at either proceeding, and was represented by appointed military counsel.¹¹² Both trial counsel and defense counsel were infantry officers;¹¹³ none were judge advocates, graduates of an accredited law school, nor members of the bar of any court.¹¹⁴ LeBallister applied for release on a writ of habeas corpus, on the basis that he was not given assistance of counsel as required by the sixth amendment.¹¹⁵

Chief Judge Stanley denied the writ and found that petitioner's counsel "represented him at each trial ably and as effectively as was possible under the circumstances,"¹¹⁶ and concluded that

an accused before a military court is not entitled as a matter of right under the Sixth Amendment to representation by legally trained counsel. The right of an accused to be so represented at a general court-martial springs not from the Sixth

¹⁰⁶ See note 69 *supra*, at 216, 33 C.M.R. at 428. (Quinn, C.J., concurring).

¹⁰⁷ The Court of Military Appeals has not disturbed, on constitutional grounds, the balance struck by Congress between military needs and the rights of servicemen as set out in Article 27 (b) of the UCMJ. In *Culp*, it found that the qualifications established for nonlawyers at special courts-martial bore a reasonable relationship to the purpose to be accomplished. *United States v. Culp*, *supra* note 69, at 217-218, 33 C.M.R. at 429-430 (Quinn, C.J., concurring). Judge Christensen, however, used constitutional grounds to examine this balance and found that, at least in *Stapley's* case, the requirements established for non-legal counsel were not sufficient to meet the minimum requirements of due process and the sixth amendment.

¹⁰⁸ 247 F. Supp. 349 (D. Kans. 1965).

¹⁰⁹ *Id.* at 351.

¹¹⁰ *Ibid.*

¹¹¹ *Id.* at 350.

¹¹² *Ibid.*

¹¹³ *Id.* at 351.

¹¹⁴ *Ibid.*

¹¹⁵ *Id.* at 350. LeBallister's petition for the writ of habeas corpus stated that he "was not afforded the opportunity to consult with, nor was he represented by competent counsel, during proceedings before special court-martial." Petition for Writ of Habeas Corpus, *LeBallister v. Warden*, No. 3919 H.C., D. Kans. Nov. 22, 1965, pp. 1-2.

¹¹⁶ *LeBallister v. Warden*, *supra* note 108, at 351.

Amendment, but from the action of Congress under Section 8, Article I of the Constitution. No such right is accorded by Congress to one being tried by special court-martial. See *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).¹¹⁷

While petitioner cited the *Stapley* decision in his behalf, Chief Judge Stanley stated that *Stapley* was expressly limited "to the peculiar circumstances of that case, including 'the frustration of the petitioner's efforts to obtain qualified legal services because of his financial inability to pay for them,' circumstances not present here."¹¹⁸

The *LeBallister* decision appears to be based on a rigid concept of "military due process", i.e., a military accused derives his rights solely from the UCMJ and not from the Constitution.¹¹⁹ In view of the facts in the instant case, Chief Judge Stanley could have reached the same conclusion by adopting the approach employed by Judge Christensen. For example, the offense charged was strictly a military offense;¹²⁰ petitioner was mentally competent,¹²¹ well educated and sophisticated;¹²² no prior "deal" had been arranged between defense counsel and the commanding officer; petitioner had not requested counsel of his own choice, nor had he questioned the adequacy or qualifications of his assigned counsel.¹²³ The circumstances, then, were quite unlike those in *Stapley*, and petitioner's counsel was evidently qualified to effectively cope with them.¹²⁴

Had Chief Judge Stanley employed this approach, it would have been unnecessary to reach the questions of whether the sixth amendment required

¹¹⁷ *Id.* at 352.

¹¹⁸ *Ibid.* This also reflects the view of the Services on the *Stapley* case as expressed by a Justice Department spokesman. "We interpret the decision as being restricted to the facts of this case. The opinion did not say that the Army had to appoint lawyers in every special court-martial case. The law says someone with training and experience in these matters must be provided. And the court found in this case that the officer had no experience in this field." *The Evening Star* (Washington, D.C.), Dec. 1, 1965, p. A-3, col. 4.

¹¹⁹ This is a return to the view as articulated by the Supreme Court in *United States ex rel. Creary v. Weeks*, 259 U.S. 336, 344 (1922). "To those in the military or naval service of the United States the military law is due process." *But see* the statement in *Burns*, *supra* note 69, that "the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers as well as civilians." *Id.* at 142.

¹²⁰ *LeBallister v. Warden*, *supra* note 108, at 351.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *LeBallister's* primary counsel at both special courts-martial was Lt. Craig B. Anderson, a college graduate and a graduate of the Army Officer Candidate School at Fort Benning, Georgia, where he had received twelve hours of instruction in military justice and participated in mock courts-martial. Before being appointed to defend *LeBallister*, he had twice served as assistant defense counsel at other courts-martial. He was Brigade defense counsel at Fort Ord, California, for special courts-martial at the time of *LeBallister's* second trial in June, 1965. Lt. Anderson stated that he in no way influenced the petitioner's guilty pleas at either proceeding. Anderson wished to prove extenuating circumstances in order to mitigate the charges against the accused, but *LeBallister* refused such efforts. Affidavit of Lt. Craig B. Anderson, *LeBallister v. Warden*, No. 3919 H.C., D. Kans. Nov. 22, 1965, pp. 1-2.

appointment of legally trained counsel. For, on the facts, it could have been found that the "minimal requirements of due process and the sixth amendment" were satisfied not merely because infantry officers were assigned to represent LeBallister pursuant to Article 27 (c) of the UCMJ, but because the counsel assigned possessed "at least minimal qualifications to rationally advise on substantive and procedural legal problems."

As the decisions now stand, and unfortunately there will not be an opportunity for the Court of Appeals for the Tenth Circuit to resolve the differences,¹²⁵ *Stapley* accepts the position of Chief Judge Quinn and Judge Ferguson of the Court of Military Appeals, to the extent that the sixth amendment right to counsel applies to military tribunals, but goes further in that assignment of counsel pursuant to the UCMJ will not suffice unless the minimal requirements of due process are satisfied;¹²⁶ whereas *LeBallister* stands for the traditional notion, as expressed by Judge Kilday of the Court of Military Appeals,¹²⁷ that the sixth amendment does not apply to military tribunals and that it is in the sole discretion of Congress to establish qualifications for counsel for courts-martial.

These two decisions, then, along with *United States v. Culp*,¹²⁸ indicate that, although Congress, the courts, and the military services themselves have made major advancements in providing the procedural safeguard of assistance of counsel, either legal or non-legal, to the men and women of the Armed Services, the question of exactly what the sixth amendment requires concerning the right to counsel and the military services is by no means settled.

S. 750

While it cannot be denied that Congress has been alert to the need of assistance of counsel for military personnel, investigation of the process of administering military justice reveals various factors indicating the necessity of further action by Congress if military personnel are to be fully protected—particularly when right to counsel is concerned.

¹²⁵ *Stapley's* attorney filed his writ for the prisoner's release on the fifty-eighth day of confinement. The prisoner would have gone free at the end of sixty days under the reduced sentence he had received from his commanding officer by pleading guilty to all charges. See note 91, *supra*, and accompanying text. In view of this, the case was only two days from being moot when it was filed. Because of this factor and the factual circumstances strongly favoring the petitioner, the Solicitor General's office did not appeal. In *LeBallister*, after initially reserving the right to appeal, petitioner's attorney allowed his appeal time to lapse. Also, petitioner wrote the clerk of the Kansas District Court expressing his desire to abandon any right to appeal. Therefore, the government's motion to preclude appeal was granted on February 18, 1965. (The above information was obtained through personal interview with *Stapley's* attorney, James P. Cowley, through the Army Litigation Department, Judge Advocate General's Corps, and through interviews with Lt. Col. Abraham Nemrow, JAGC, Chief of Army Litigation, who participated as counsel for the government in *LeBallister*.)

¹²⁶ See note 107 *supra* and accompanying text.

¹²⁷ *United States v. Culp*, *supra* note 69, at 200, 33 C.M.R. at 412.

¹²⁸ *Supra* note 69.

First, while the Armed Services have highly competent legally qualified counsel, the competency of non-legal military counsel is subject to doubt. The non-legal defense counsel in the *LeBallister*¹²⁹ case was considered competent.¹³⁰ However, their competency to deal with the intricacies and technicalities of the law, even if one considers military law to be more simplified in practice than civil law,¹³¹ is questionable.¹³² Certainly the total lack of legal qualifications of the military defense counsel in the *Stapley* case is evidence that the provisions for counsel in the UCMJ are not fool-proof in providing competent and qualified counsel for military personnel.¹³³

A second factor is the loss of certain benefits and the universal recognition of the stigma resulting from a bad conduct discharge.¹³⁴ While it is the policy of the Army not to allow special courts-martial to impose a bad conduct discharge¹³⁵ and while the Air Force invariably makes available legally trained counsel for an accused at a special court-martial,¹³⁶ there is no statutory requirement that these guarantees will be preserved. Of concern also is the possibility that the use of administrative discharges is a "means of circumventing the requirements of the Code."¹³⁷ The loss of benefits and resulting stigma is no less the case for an administrative discharge under conditions other than honorable.¹³⁸ While the Department of Defense has issued various directives concerning the right to counsel in connection with administrative discharges under conditions other than honorable,¹³⁹ counsel need not be furnished if unavailable,¹⁴⁰ and there is, again, no statutory requirement preserving this safeguard.

A final factor having an impact on Congress' duty to assure military personnel certain safeguards has been the recognition by the Supreme Court

¹²⁹ *LeBallister v. Warden*, *supra* note 108.

¹³⁰ *Id.* at 351; see note 124 *supra*.

¹³¹ *United States v. Culp*, *supra* note 69, at 217, 33 C.M.R. at 428 (Quinn, C.J., concurring).

¹³² *Infra* notes 215-219 and accompanying text.

¹³³ For further illustration see *Neal v. United States*, No. 226-62, Ct. Cl., Jan. 20, 1966.

¹³⁴ 111 CONG. REC. 1228 (daily ed. Jan. 26, 1965).

¹³⁵ *Summary: Report of Hearings by the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary* (hereinafter cited as *Summary: 1962 Hearings*), 88th Cong., 1st Sess. 42 (1963); under A.R. 27-12, par. 1, Oct. 15, 1965, court reporters are not detailed to a special court-martial; consequently a special court-martial cannot adjudge a bad-conduct discharge. See 10 U.S.C. § 819 (1964).

¹³⁶ *Summary: 1962 Hearings* 42.

¹³⁷ [1960] C.M.A. & JAG ANN. REP. 12.

¹³⁸ 111 CONG. REC. 1228 (daily ed. Jan. 26, 1965); Ervin, *The Congressional Study on the Constitutional Rights of Military Personnel*, JAG J. 4, 6-7 (1963).

¹³⁹ The latest Directive is DoD DIRECTIVE 1332.14, *Administrative Discharges*, Dec. 20, 1965.

¹⁴⁰ The Directive is similar to S. 750 § 2 in that it provides that "no member shall be discharged under conditions other than honorable unless he is afforded the right to present his case before an administrative discharge board with the advice and assistance of counsel" Sec. V, A (2). Counsel is defined as "a lawyer within the meaning of article 27 (b) (1) of the Uniform Code of Military Justice unless appropriate authority certifies in the permanent record the nonavailability of a lawyer so qualified and sets forth the qualifications of the substituted nonlawyer counsel." Sec. IV, K.

that right to counsel is "fundamental and essential to a fair trial."¹⁴¹ The reaction by some of the states to the Court's pronouncement has been an extension of the right to counsel further for civilians than the UCMJ presently extends it for military personnel.¹⁴²

These various factors have led to the conclusion, as expressed by Senator Ervin, that "except in an emergency situation created by war, any serviceman should have the assistance of a qualified attorney to assist him in connection with a proceeding which may result in a discharge under other than honorable conditions."¹⁴³ Therefore, on January 26, 1965, Senator Ervin, Chairman of the Senate Subcommittee on Constitutional Rights, introduced S. 750¹⁴⁴—a bill which would further extend the right to legal counsel for the men and women of the Armed Forces. The bill, one of eighteen, is part of "a legislative program designed to further safeguard the constitutional rights of our Nation's service men and women who for so long have sacrificed so much to protect our American way of life."¹⁴⁵

The set of bills was introduced following an extensive four-year study by the subcommittee¹⁴⁶ and would make alterations to various aspects of the UCMJ.¹⁴⁷ As far as the role of legal counsel in administering military justice is concerned, the proposed legislation would, in addition to the changes required by S. 750 discussed below, give a statutory basis to the field judiciary presently employed by the Army and Navy, extend the system to the Air Force, facilitate the interservice use of field judiciary members, and allow

¹⁴¹ *Gideon v. Wainwright*, 372 U.S. 325 (1963). For a development of the cases through which the Court gave fuller meaning to the right to counsel provision, see *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Betts v. Brady*, 316 U.S. 455 (1942); *White v. Maryland*, 373 U.S. 39 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹⁴² For a discussion of the changes in practice, which are taking place in various states, in an attempt to resolve the problems concerning the scope of the *Gideon* decision, see Silverstein, *The Continuing Impact of Gideon v. Wainwright in the States*, 51 A.B.A.J. 1023 (1965).

¹⁴³ 111 CONG. REC. 1228 (daily ed. Jan. 26, 1965).

¹⁴⁴ S. 750, 89th Cong., 1st Sess. (1965).

¹⁴⁵ 111 CONG. REC. 1227 (daily ed. Jan. 26, 1965).

¹⁴⁶ Extensive hearings were held by the subcommittee in 1962 to determine the need for legislation to insure a more satisfactory method of safeguarding the constitutional rights of military personnel. In addition to the information received during these hearings from the Defense Department, Court of Military Appeals, bar associations, veterans groups, and experts in military law, the subcommittee also conducted an extensive field investigation in Europe to obtain firsthand views as to the adequacy of our present system of military justice. *Ibid.*

The Summary Report issued by the subcommittee contained twenty-two recommendations, most of which were embodied in the set of bills first introduced by Senator Ervin on August 6, 1963. No action was taken at this time. Following the introduction of the bills on January 25, 1965, hearings were conducted in January and March of 1966.

¹⁴⁷ The 18 bills now before this Subcommittee can be categorized by their principle objectives as follows: 1) those which strengthen the independence, prestige and military justice personnel in the exercise of their duties; 2) those which further implement the Constitutional guarantee that no person shall be deprived of life, liberty or property without due process of law; 3) those which simplify and improve military justice procedures; and 4) those which close jurisdictional gaps. *Transcript: 1966 Hearings* 405.

the use of civilian attorneys in the system;¹⁴⁸ establish a Judge Advocate General's Corps for the Navy;¹⁴⁹ require a law officer to be detailed to a special court-martial adjudging a bad conduct discharge;¹⁵⁰ provide legal counsel to serve on appellate review of certain administrative proceedings;¹⁵¹ require a law officer to be detailed to an administrative board issuing a discharge under conditions other than honorable;¹⁵² and insure the right to counsel in cases involving minor offenses by abolishing the summary court-martial.¹⁵³

Section 1 of S. 750 would amend 10 U.S.C. § 819, providing, in part, that a special court-martial, except in time of war, cannot adjudge a bad conduct discharge "unless the accused was represented at the trial, or afforded the opportunity to be represented at the trial," by legally qualified counsel. Section 2 would amend 10 U.S.C. § 941, providing, in part, that no member of the Armed Forces can be administratively discharged under conditions other than honorable unless such member is afforded the opportunity to appear before a board called for such purpose and to be represented before such board by legally qualified counsel.

The subcommittee's conclusion, after the hearings held in early 1962, that it is "undesirable that servicemen receive a bad conduct discharge without being provided an attorney, if the accused desires a lawyer's aid and if there is any feasible method for the services to provide him a legally qualified defense counsel,"¹⁵⁴ is apparently shared by all concerned with military justice, for during the hearings held in 1966, § 1 of the proposed bill was approved by the judges of the Court of Military Appeals,¹⁵⁵ the Judge Advocate Generals,¹⁵⁶ the Department of Defense,¹⁵⁷ and almost all others testifying before the subcommittee.¹⁵⁸ In view of the policy of the Army and Air Force regarding special courts-martial,¹⁵⁹ it appears that the Navy is the only branch of service which would have any difficulty adjusting to the practice. In any event, there appears to be no opposition to § 1.

Testimony before the subcommittee reveals, though, that there are some

¹⁴⁸ S. 745, 89th Cong., 1st Sess. (1965).

¹⁴⁹ S. 746, 89th Cong., 1st Sess. (1965).

¹⁵⁰ S. 752, 89th Cong., 1st Sess. (1965).

¹⁵¹ S. 753, 89th Cong., 1st Sess. (1965).

¹⁵² S. 754, 89th Cong., 1st Sess. (1965).

¹⁵³ S. 759, 89th Cong., 1st Sess. (1965).

¹⁵⁴ *Summary: 1962 Hearings* 43.

¹⁵⁵ Statements of Chief Judge Quinn and Judges Kilday and Ferguson, *Transcript: 1966 Hearings* 578, 608, 620; see also [1964] C.M.A. & JAG ANN. REP. 2.

¹⁵⁶ *Transcript: 1966 Hearings* 27, 38-39.

¹⁵⁷ *Ibid.*

¹⁵⁸ A notable exception was the testimony of Frederick Bernays Wiener, who recommended that only a general court-martial be permitted to issue a discharge for misconduct, thereby eliminating the need for legal counsel at either special courts-martial or administrative proceedings. *Id.* at 639-645.

¹⁵⁹ *Supra* notes 135, 136.

who feel Congress should further extend the right to legal counsel. One witness, a lawyer whose practice is confined largely to representation of military personnel, stated: "In view of the decision of the United States Supreme Court in *Gideon v. Wainwright* I can perceive no justification for permitting the trial of an individual before a special court-martial where he is not furnished with qualified counsel to represent him."¹⁶⁰

This view was shared by the witness testifying in behalf of the American Civil Liberties Union, who added that

Not only is a court-martial conviction a criminal conviction that remains with a defendant the rest of his life, but the sentences that may be imposed (short of a punitive discharge), such as confinement at hard labor for six months, forfeiture of two-thirds of one's pay, and reduction to the lowest enlisted grade, are sufficiently severe to justify the required presence of a legally trained defense counsel.¹⁶¹

Chief Judge Quinn of the Court of Military Appeals, while favoring the bill, recommended elimination of the "time of war" exception, noting that "the exercise of military power in time of war tends to be more arbitrary than in peacetime," and that the UCMJ had been enacted because of the "unacceptable practices developed during World War II"¹⁶²—a repetition of which might possibly be avoided by the requirement of representation of legal counsel. The Chief Judge also stated that "the provision raises a serious question as to its applicability during a time when Congress has not actually declared war, as provided in the Constitution."¹⁶³

Section 2 of the bill met with favorable reaction,¹⁶⁴ but, while it was agreed that such a discharge was just as damaging as a bad conduct discharge, there was not total support for including the provision as part of the UCMJ.¹⁶⁵ The Department of Defense maintains that "there is and should be a clear separation in the statutes between (1) those provisions which establish the military judicial system, and (2) laws pertaining to administrative procedures,"¹⁶⁶ and, thus, recommends that such procedures should not be incorporated in the UCMJ but elsewhere in Title 10 of the United States Code¹⁶⁷

However, as was pointed out at the hearings,

¹⁶⁰ Statement of Fred W. Shields, *Transcript: 1966 Hearings* 884.

¹⁶¹ Statement of Edward S. Cogen and Lawrence Spreiser, *Transcript: 1966 Hearings* 685.

¹⁶² Statement of Chief Judge Quinn, *Transcript: 1966 Hearings* 378.

¹⁶³ *Ibid.*

¹⁶⁴ For the subcommittee's original conclusions regarding legal counsel and administrative discharges, see *Summary: 1962 Hearings* 4-5, 51.

¹⁶⁵ Statement of Brigadier General William W. Berg, Deputy Ass't Secretary of Defense (Military Personnel Policy), *Transcript: 1966 Hearings* 712.

¹⁶⁶ *Id.* at 713.

¹⁶⁷ *Id.* at 716.

the vice of current administrative elimination procedures is that they eliminate for misconduct with a concomitant stigma while evading the safeguards that should accompany elimination for that reason. Once consequence to the individual of an elimination for misconduct is kept in mind, it becomes absurd to prate, as Army officials so often do, that "this is administrative, not criminal."¹⁶⁸

Notwithstanding whether such procedures are "criminal prosecutions" and within the scope of the sixth amendment, the proposed bill, if passed, will add further definition to the phrase "right to counsel" in connection with military personnel. However, just as the differences in the later court decisions indicate that the question of how far the sixth amendment right to counsel should be extended remains unsettled, the testimony of those who urge that the proposed bill does not go far enough also indicates that the question of right to counsel and the military, as far as congressional activity is concerned, remains unsettled, despite the proposed legislation.

THE PRESENT QUESTIONS

A century and a half have passed since Brigadier General William Hull invoked at least the spirit, if not the letter, of the sixth amendment right to counsel.¹⁶⁹ As can be seen from the foregoing discussion, since the rejection of General Hull's plea for right to assistance of counsel in a constitutional sense, much has been done by the Congress and the courts to apply the spirit of the right to counsel provision to military tribunals—short of direct application of the full scope of the provision itself. The discussion also reveals that exactly what the sixth amendment right to counsel requires as far as the military services are concerned is not clearly defined. It is time, then, to return to the questions posed at the beginning of this discussion.¹⁷⁰

Does the Sixth Amendment Right to Counsel Apply to Military Tribunals?

Any interested student of the Constitution realizes that raising what at one time is no more than a theory advocated by a few to the level of constitutional doctrine is not an insurmountable problem.¹⁷¹ While the drafters of the sixth amendment may not have intended the right to counsel provision to apply to courts-martial in 1789, it does not necessarily follow that their intention would have been the same for courts-martial in 1966.

¹⁶⁸ Statement of Frederick Bernays Wiener, *Id.* at 630.

¹⁶⁹ *Supra* note 10.

¹⁷⁰ While one hesitates to predict what "will" be done, since those without the responsibility of office too often say what "should" be done, the discussion of the questions will follow an approach of what "could" be done.

¹⁷¹ *E.g.*, compare *Plessy v. Ferguson*, 163 U.S. 537 (1896) with *Brown v. Board of Education*, 347 U.S. 483 (1954); *Betts v. Brady*, 316 U.S. 455 (1942) with *Gideon v. Wainwright*, 372 U.S. 325 (1963); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) with *United States v. Darby*, 312 U.S. 100 (1941).

"We're under a Constitution," the oft-quoted declaration states, "but the Constitution is what the judges say it is."¹⁷² True, the Constitution may not have said that an accused before a military tribunal had the right to assistance of counsel at a time when the persons subject to federal military law were of an exceedingly small number,¹⁷³ were volunteers,¹⁷⁴ and were often regarded as little more than slaves,¹⁷⁵ and at a time when the offenses denounced by military law were peculiar to military service itself and not punishable in common law courts.¹⁷⁶ Perhaps the Constitution has a slightly different meaning, however, at a time when those subject to federal military law number in the millions,¹⁷⁷ are serving as a result of involuntary draft laws,¹⁷⁸ and can be tried for any crime before a court-martial.¹⁷⁹

Consequently, while historical evidence would make it difficult, if not inaccurate,¹⁸⁰ to say the original meaning of the Constitution was that the right to counsel applied to military tribunals, there exist sound constitutional theories to permit one to say correctly, in view of the vastly changed circumstances, that the Constitution now means that military personnel, as are civilians in both state and federal courts,¹⁸¹ are guaranteed, either directly or indirectly, the sixth amendment right to assistance of legally trained counsel.

One theory concerning the protections of the entire Bill of Rights, advocated by Frederick Bernays Wiener, would indirectly apply the sixth amendment protection to military personnel through the due process clause of the fifth amendment.¹⁸² According to Mr. Wiener, the constitutional protections would be assured for those subject to military justice by "read[ing] into the due process clause of the fifth amendment the substance of the guarantees that have been read into the due-process clause of the fourteenth—guarantees whose substance is presently applicable to military persons—and to mark out a line from case to case with due regard to the actualities of the military situation."¹⁸³

¹⁷² This statement was first made by Charles Evans Hughes, then governor of New York, in a speech before the Elmira Chamber of Commerce, May 3, 1907.

¹⁷³ See Wiener I at 9. In 1789 the active troops totaled 672; by 1792, although the authorized total was 5,120, the actual total was only 3,692.

¹⁷⁴ *Id.* at 8 n.47. The first national draft act was not passed until the Civil War. Act of March 3, 1863, ch. 75, 12 Stat. 731.

¹⁷⁵ See Wiener II at 293.

¹⁷⁶ See Wiener I at 10.

¹⁷⁷ *Id.* at 11. As of January 31, 1966, the number of active military personnel totaled 2,899,724. DoD News Release #169-66, March 2, 1966.

¹⁷⁸ The Universal Military Training and Service Act was recently amended to extend the draft until July 1, 1967. Act of March 28, 1963, 77 Stat. 4 (1965); 50 App. U.S.C. 467 (c) (1964).

¹⁷⁹ See Wiener I at 11-12.

¹⁸⁰ See notes 7-8 *supra* and accompanying text.

¹⁸¹ See cases cited *supra* note 141.

¹⁸² Wiener II at 294-304.

¹⁸³ *Id.* at 303. Query whether Judge Christensen's analysis in *Application of Stapley*, 246 F. Supp. 316 (D. Utah 1965), adopts this approach or whether *Stapley* embodies a direct application of the sixth amendment.

Precedential support for the flexibility of the due process clause of the fifth amendment exists in the Supreme Court decision that the equal protection of the laws clause which textually appears in the fourteenth amendment is also included in the meaning of due process under the fifth amendment.¹⁸⁴ As Wiener points out, his theory "will not involve nearly as great an advance in constitutional interpretation"¹⁸⁵ as has other cases, "nor will it encounter the community opposition which arises when a new doctrine runs ahead of and in opposition to community mores."¹⁸⁶

Following this theory, then, it could just as easily be concluded that the due process clause of the fifth amendment requires application of the sixth amendment right of counsel to military tribunals as it was recently concluded that the due process clause of the fourteenth amendment requires application of the sixth amendment right to counsel to the state courts.¹⁸⁷

Finding no quarrel with Mr. Wiener's theory and agreeing that "it is not doctrinaire liberalism to urge that its [the fifth amendment's] sweep is broad enough to harden into constitutional bone the gristle of statutory sanctions that now protects the personnel of our armed services,"¹⁸⁸ it is submitted, though, that this is not the sole theory under which the protection of right to counsel for servicemen can be elevated to constitutional dignity.

There is a more direct approach available. A fact noted by Mr. Wiener is that the right to counsel provision was not declaratory of existing law, as were other provisions of the Bill of Rights,¹⁸⁹ but was designed to correct an existing evil.¹⁹⁰ While many states had rejected the British practice of permitting defense counsel only for persons accused of treason,¹⁹¹ it is "a fair summary to conclude that the sixth amendment, insofar as it granted the right to counsel 'in all criminal prosecutions,' guaranteed for all time a right only recently won, and that not universally nor in all cases."¹⁹²

At the time of the drafting of the sixth amendment, the right to counsel provision had the limited meaning only that counsel could speak in court.¹⁹³ Since that time, the meaning of right to counsel has been broadened to require supplying counsel in all cases, federal and state, capital and non-capital.¹⁹⁴ Right to counsel means not merely that a defendant must be given an

¹⁸⁴ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁸⁵ Wiener II at 299.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Gideon v. Wainwright*, *supra* note 141.

¹⁸⁸ Wiener II at 303-304.

¹⁸⁹ Wiener I at 3-4. Trial by petit jury, presentment by grand jury, due process, guarantee of bail, privilege against self-incrimination, and prohibition against double jeopardy were well settled in English law.

¹⁹⁰ *Id.* at 4.

¹⁹¹ *Ibid.*

¹⁹² *Id.* at 5.

¹⁹³ *Id.* at 4-5. See note 10 *supra* for the role of counsel in early courts-martial proceedings.

¹⁹⁴ See cases cited *supra* note 141.

opportunity to have a lawyer appear with him in the courtroom, but that counsel must be provided for a poor person at a preliminary examination which is or may be a critical stage of the prosecution,¹⁹⁵ and that counsel must be provided when an investigation shifts from investigatory to accusatory.¹⁹⁶

While it has been submitted that the changes in the interpretation of the sixth amendment right to counsel reflects an application of the fifth amendment¹⁹⁷ (and thus Mr. Wiener's theory and the one presented herein may be one and the same thing), the fact remains that no limitations on the definition yet exist. The expanded definition of right to counsel, as it presently stands, indicates that it is but a small step forward to expand the definition to include application of this fundamental right to military personnel to the extent that it is applied to civilians.

It would seem that there would be little difficulty in resolving the question of whether the sixth amendment right to counsel applies to military tribunals. Under Mr. Wiener's theory of indirect application through the due process clause of the fifth amendment or according to the theory of direct application through further definition of the right to counsel provision of the sixth amendment, it is clear that there exists sound theoretical basis upon which the constitutional protection of right to assistance of counsel may be provided for the men and women who serve to protect and preserve the Constitution.

Does Right to Counsel Refer to Legally Trained Counsel?

Congress has provided for legally qualified counsel at general courts-martial and for military counsel at special courts-martial.¹⁹⁸ Those courts which have taken the position that the sixth amendment applies to military tribunals have consistently held that the right to counsel, where applied to military tribunals, does not necessarily mean the right to legal counsel.¹⁹⁹ The most recent judicial pronouncement that the sixth amendment right to counsel applies to special courts-martial concluded that it was "unnecessary to decide whether before such tribunals under all circumstances an accused is entitled to be represented by counsel who have been trained and admitted to practice before a civilian court. . ."²⁰⁰ There has been no court decision specifically holding that the sixth amendment, if applied to courts-martial, would require legal counsel as opposed to military counsel. Whether this should be the case, then, is unresolved.

¹⁹⁵ *White v. Maryland*, *supra* note 141.

¹⁹⁶ *Escobedo v. Illinois*, *supra* note 141.

¹⁹⁷ FREUND, ON UNDERSTANDING THE SUPREME COURT 34-35 (1949).

¹⁹⁸ 10 U.S.C. § 827 (1964).

¹⁹⁹ *E.g.*, *Romero v. Squier*, 133 F.2d 528 (9th Cir. 1943), *cert. denied*, 318 U.S. 785 (1943); *Altmayer v. Sanford*, 148 F.2d 161 (5th Cir. 1945).

²⁰⁰ Application of Stapley, 246 F. Supp. 316, 320 (D. Utah 1965).

Mr. Justice Sutherland has well stated the necessity for a lawyer to represent an accused during a criminal proceeding:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incomplete evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel in every step of the proceedings against him. Without it, though he not be guilty, he faces the danger of conviction because he does not know how to establish his innocence.²⁰¹

Mr. Justice Sutherland's comments refer to civilians; but are they any less appropriate where military personnel are concerned? The punishment and loss of benefits meted out by a court-martial are no less real than that by a civilian court. It is true, however, that under the UCMJ, an accused is provided with legal counsel when a capital offense is involved, *i.e.*, when the accused appears before a general court-martial.²⁰² Should not this statutory protection be given the permanency and strength of a constitutional protection? An accused is provided with legal counsel when a non-capital offense is involved, *i.e.*, when he appears before a special court-martial, only when the trial counsel is legal counsel.²⁰³ The proposed legislation may alter this if the punishment to be adjudged is a bad conduct discharge.²⁰⁴ Yet, is there any reason why legal counsel should not also be provided when the punishment for the non-capital offense is less? Furthermore, the sixth amendment requires that civilians shall have the right to assistance of counsel in all capital and non-capital cases.²⁰⁵ If civilians are entitled to legal counsel in all non-capital cases, why should not a similar right exist for military personnel?

If military law regulated only military offenses, as it did when the Bill of Rights was first adopted,²⁰⁶ a stronger argument could be made for limiting the meaning of counsel to non-legally trained military counsel. However, as has been noted above,²⁰⁷ the UCMJ places no limitations on the type of crime which can be tried by a court-martial.

While various guidelines are provided for military counsel in assisting an

²⁰¹ *Powell v. Alabama*, *supra* note 141.

²⁰² 10 U.S.C. §§ 818, 827 (b) (1964).

²⁰³ 10 U.S.C. §§ 819, 827 (c) (1964).

²⁰⁴ S. 750, 89th Cong., 1st Sess. (1965).

²⁰⁵ *Supra* note 141.

²⁰⁶ *Supra* note 176.

²⁰⁷ *Supra* note 179.

accused²⁰⁸ and while the UCMJ stipulates certain procedural steps to aid the accused,²⁰⁹ it is still doubtful whether military counsel, no matter how competent in other areas, are sufficiently skilled to adequately defend an accused, no matter how petty the charge may be, especially when it is not one of a military nature. Although the UCMJ provides for automatic review of all courts-martial trials,²¹⁰ the absence of a lawyer at the original proceedings may reduce the practical value to an accused of this automatic review.²¹¹

In the *Culp*²¹² case, Chief Judge Quinn and Judge Ferguson discussed the qualifications of military counsel and whether legal counsel was desirable. Chief Judge Quinn defended the qualifications established by Congress and stressed the automatic review of all courts-martial trials required by the UCMJ.²¹³

While Judge Ferguson's remarks were in reference to the necessity of legal counsel when a bad conduct discharge is involved,²¹⁴ the objections he stated apply to military counsel in general. First, the training in military law for a nonlawyer, being no more than a "general orientation course" and lacking any "rigorous and intensive process which fits one to become the advocate of an individual enmeshed in the toils of criminal law," does not provide "the training required to perform adequately as counsel for an accused."²¹⁵

Second, a layman is not necessarily aware of the "ethical responsibilities" of the legal profession and "will never understand an attorney's devotion to the interests of an 'obviously guilty' client or the singleminded loyalty to the latter's cause which almost unexceptionally characterizes the practice of law."²¹⁶ A nonlawyer's duty to the Armed Services may take precedence over his duty to his client, for, as Judge Ferguson stated:

It seems to me well nigh impossible for one untrained both in the law and in the inviolable standards of the legal profession to put to one side what he might conceive as his responsibility to the service and devote himself entirely to the interests of an individual whom he may privately think undesirable.²¹⁷

Third, Judge Ferguson does not see automatic appellate review as a substitute for legal counsel.²¹⁸ As Senator Ervin has pointed out, the review is on the basis of the entire record, and a nonlawyer may not recognize what evidence or information, which will be beneficial to the accused, should be

²⁰⁸ *Supra* note 65.

²⁰⁹ *Supra* notes 40-46 and accompanying text.

²¹⁰ 10 U.S.C. §§ 859-876 (1964).

²¹¹ *Infra* notes 218-220 and accompanying text.

²¹² *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

²¹³ *Id.* at 218, 33 C.M.R. at 430. (Quinn, C.J., concurring).

²¹⁴ *Id.* at 219, 33 C.M.R. at 431 (Ferguson, J., concurring).

²¹⁵ *Ibid.*

²¹⁶ *Id.* at 220, 33 C.M.R. at 432.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

placed into the record; consequently, appellate defense counsel can not take advantage of this information.²¹⁹ The experience of the Court of Military Appeals supports Senator Ervin's conclusion, as shown by Judge Ferguson's statement:

The many guilty pleas which we have reviewed on the basis of skimpy transcripts bear eloquent witness to the cogency of Senator Ervin's comments. How are we to know the real truth of the matters involved, if the accused, upon the advice of a nonlawyer, chooses to confess his guilt judicially and nothing is placed in the record to support the validity of his plea except for a formula prated from the Manual for Courts-Martial, United States, 1951? We can go only upon the record in measuring its legal sufficiency to support the findings and sentence. Yet, we are truly ignorant of what might have been done had the accused's evidence been viewed by an attorney thoroughly versed in the law and bound by the sanctions of the Canons of Ethics to advise and counsel with his client in the best traditions of Anglo-American advocacy.²²⁰

It must be remembered, though, that certain charges are peculiar to military life, such as disobeying an order or absence without leave, which have no direct counterpart in civilian life, and that the procedure of a special court-martial differs from the proceedings in civilian courts. Emphasis is placed on these factors by Chief Judge Quinn, who states: "An officer's ordinary training and experience, therefore, are reasonably calculated to make him learned in the simplified procedures and in the substance of the military type offenses that normally come before such courts."²²¹

Although there is no direct counterpart in civilian life to the military type of offense, certain offenses in the nature of traffic violations, public disorder and the like bear resemblance. As of yet, the right to assistance of counsel has not been extended to the point where a lawyer must be furnished for civilians charged with such offenses.²²² It would seem, therefore, that there should be no requirement that legal counsel be provided for military personnel charged with offenses of a similar nature under military law.

A proposed solution to the problem of whether right to counsel refers to legally qualified counsel—a solution which perhaps resolves the differences in approach taken by Chief Judge Quinn and by Judge Ferguson—would be, in addition to requiring legal counsel where the punishment to be imposed is of a serious nature and consequence, to require legal counsel for military personnel in every situation where a lawyer would necessarily be required if the offense were committed in a civilian setting. When a serviceman is accused of an offense which, had he committed as a civilian, assistance of coun-

²¹⁹ 109 CONG. REC. 13354 (daily ed. Aug. 6, 1963).

²²⁰ *United States v. Culp*, *supra* note 212, at 220, 33 C.M.R. at 432 (Ferguson, J., concurring).

²²¹ *Id.* at 217, 33 C.M.R. at 429.

²²² See Silverstein, *supra* note 142, at 1026.

sel would have been provided, there is no justification in denying him such assistance only for the reason that he is a serviceman. A man is a citizen first, a soldier second. If the right to counsel—the right to assistance by an attorney—is a fundamental and essential right under the Constitution necessary for the fair trial of a civilian, then, indeed, it would be ironic if this same right were denied to those who defend the Constitution merely because they have donned a military uniform.

Can the Constitutional Right to Counsel Be Practically Applied to Military Tribunals?

Certain objections may be raised to recognizing that the sixth amendment entitles a serviceman to legally qualified counsel. Among these are—that it won't work in time of war; that the military services would have difficulty adjusting to such an extension; that the supply of lawyers is inadequate to assign legal counsel to all courts-martial proceedings; and that the requirement will have a detrimental effect on maintaining discipline and morale. An examination of these considerations is desirable to ascertain whether the constitutional right can be effectively, as well as theoretically, applied.

Time of War. This particular consideration may be irrelevant during time of peace. "[I]t does not seem appropriate today to deprive our young men in uniform of safeguards we now provide them because those safeguards might not work well if war should come at some undetermined time."²²³ On the other hand, wartime may be the very time that a serviceman may need the protection of legal counsel if the offense charged is other than a military offense for the "exercise of military power in time of war tends to be more arbitrary than peacetime."²²⁴ If the offense is military only, legal counsel may not be necessarily required.

Whatever the case, it is premature to reject right to counsel for servicemen as not being required by the sixth amendment simply because the exigencies of war may affect the right. When martial law is declared and when military necessity requires, the question of how far the right is affected, if at all, may be determined.²²⁵

Difficulty of Adjustment. As has been seen throughout this discussion, Congress, the courts, and the services themselves have extended the right to counsel to servicemen in many situations, motivated by the desire to provide for servicemen one of the fundamental safeguards of civilized society. Whatever difficulties of adjustment were necessitated by such extensions have been suc-

²²³ Ervin, *supra* note 138, at 11.

²²⁴ *Supra* note 162.

²²⁵ *Cf. Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

cessfully resolved.²²⁶ Should the situation alter if motivation is replaced by constitutional direction?

All services are, of course, required to assign legal defense counsel for general courts-martial and for special courts-martial when trial counsel is legal counsel.²²⁷ Since the Air Force policy is to assign lawyers to all special courts-martial, the Air Force should have no difficulty in adjusting to the practice. Any difficulty the Army might have would be due to the availability of lawyers, discussed below, but not to the nature of Army operations, which are confined to the ground and conducted in or near a base complex. The only service seriously affected by such a requirement would be the Navy, whose operations make it impractical to assign lawyers to all ships in order to defend an accused while on extended cruises.²²⁸

However, this same problem arises when a serviceman commits an offense on board ship which would subject him to a general court-martial. Since a general court-martial cannot be convened without the proper personnel,²²⁹ the commanding officer must either confine the accused, or, if it is an extended cruise and such confinement is impossible or impractical until the ship returns to port, he must be taken off the ship.

Since the Navy has had to cope with these conditions as far as general courts-martial are concerned and since proceedings involving a minor offense or one of a strictly military nature may not necessarily require legal counsel, the area of difficulty is that which involves an offense which, had it been committed by a civilian, the accused would be entitled to legal counsel. If this be the case, the commanding officer could proceed in the same manner as he would with an accused awaiting a general court-martial. It might be said that this course of argument points toward the complete abolition of special and summary courts-martial, if not officially, at least in practice. This, however, is not a novel suggestion, even if true, and has been advanced by military experts in the past.²³⁰

Notwithstanding the difficulties of adjustment, Senator Ervin's words, in reference to the inconveniences of making a lawyer available to a serviceman threatened with a discharge under conditions other than honorable, are particularly appropriate to this objection: "However, if the Armed Services display the same initiative and imagination in confronting this problem that the

²²⁶ For an example of how the military services have resolved certain adjustment difficulties, see the description of the Navy's answer to the shortage of court reporters necessitated by the requirement of 10 U.S.C. § 819 (1964) that "a bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony before the court has been made." Ward, *UCMJ—Does It Work*, 6 VAND. L. REV. 186, 214 (1953).

²²⁷ 10 U.S.C. § 827 (1964).

²²⁸ Cf. Ward, *supra* note 226, at 187.

²²⁹ 10 U.S.C. § 816 (1964).

²³⁰ Statement of Seymour W. Wurfel, Professor, Law School, University of North Carolina: "The enlarged powers now available under non-judicial punishment make it practicable to

Army has shown in developing its field judiciary system, I believe the difficulties can be surmounted."²³¹

Supply of Lawyers. As far as the sufficiency or availability of manpower to implement a constitutional directive to provide legally qualified counsel, the objections of the military²³² are perhaps motivated by objection to the change in policy rather than by any real difficulty in making lawyers available. As Judge Christensen noted in *Application of Stapley*,

[W]ith the increasing personnel in the military service, the rapidity and ease of transportation and the training facilities and techniques readily available for specialized training or experience, it is no longer reasonable or necessary, if it ever were, to deem any officer qualified to act as defense counsel for an accused merely because he is an officer.²³³

The Statement of the American Civil Liberties Union at the subcommittee hearings indicates, perhaps, that the "manpower shortage" argument is a myth:

We note that some of the proposals prepared by your subcommittee . . . undoubtedly will dictate the greater utilization of legally trained personnel. To those who would oppose the proposals or revisions on the ground that the Judge Advocate components of the various armed services are inadequately staffed to meet this demand, we would suggest two answers. First, more efficient allocation of existing manpower resources would considerably expand the availability of legally trained personnel. Thus, Judge Advocates who presently are required by many commanders to perform totally unskilled jobs, such as taking of inventories, assignments as club officers or duty officers, and the like, could be freed from such tasks, and their time could more appropriately be spent in the performance of legal duties. Second, because current DOD [Department of Defense] manning requirements have been fully satisfied, many young attorneys are denied appointments as Judge Advocates and are instead called to active duty in non-legal capacities. Accordingly, a large reserve of potential military attorneys remains untapped because of the Defense Department's own personnel policies.

eliminate both summary and special court-martial. If the proceeding is in fact "non-judicial" fine; if it is "judicial" at all, it should be fully judicial in all respects in justice to both sides. A general court has of course always had jurisdiction to impose the lesser punishment normally associated with special courts." *Transcript: 1966 Hearings* 311. See also S. 759, 89th Cong., 1st Sess. (1965), which proposes the abolition of summary courts-martial.

²³¹ Ervin, *supra* note 138, at 7.

²³² Brigadier General Kenneth J. Hodson, Ass't Judge Advocate General, United States Army, stated before the subcommittee that the "additional requirement for legal services" required by the proposed amendments to the UCMJ "imposes an unacceptable demand on military manpower sources." *Transcript: 1966 Hearings*, 55. Unfortunately, there is no statistical evidence available to indicate exactly how large a demand extending the constitutional right to counsel to servicemen would make on military manpower sources.

²³³ *Supra* note 200, at 321.

Thus, it is our view that there is a sufficient source of legally qualified persons to implement any legislation designed to safeguard the constitutional rights of military personnel.²³⁴

Maintaining Discipline and Morale. If a commanding officer has no direct means of disciplining a man who has committed an offense detrimental to the morale of the unit, and instead, has to refer the offender to a court-martial removed from the location where the offense is committed in order for the offender to receive assistance of legal counsel for what might normally be a purely disciplinary matter, the effect on the remaining men under his command may be injurious to the commanding officer's stature.²³⁵ For the ground forces this would be prevalent in the field. But the problem would be even greater for a commanding officer of a ship at sea.

This objection, however, can be overcome by a commanding officer's intelligent use of the present provisions of the UCMJ.²³⁶ The offense which will normally fall within the scope of matters having a debilitating effect on discipline and morale, if not met with an immediate command remedy, are those which may be treated under Article 15. Having recently been expanded,²³⁷ a commanding officer's powers to render immediate punishment for an offense, when he deems it necessary for the welfare of the unit as a whole, are carefully laid out and, in effect, are broad in scope.²³⁸

On a ship at sea, punishment may be administered even where the offender demands a trial by court-martial,²³⁹ if immediate remedy is necessary. Such broad power is essential for the safety of the ship and is in line with the commanding naval officer's traditionally broad "mast powers."²⁴⁰ The punitive remedies are clearly defined²⁴¹ and the immediate imposition of disciplinary punishment does not act as a bar to "trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article."²⁴² Also, punishment under this article does not appear as a criminal conviction on the record of the offender.²⁴³ In the case of ground forces, upon the demand of the accused, he may not be punished under Article 15, but may receive the proper court-martial.²⁴⁴ It is, therefore,

²³⁴ *Transcript: 1966 Hearings* 685.

²³⁵ See generally Ward, *supra* note 226, at 225-227.

²³⁶ See 10 U.S.C. § 815 (1964) which deals with non-judicial punishment.

²³⁷ Act of September 7, 1963, 76 Stat. 447. See Ward, *supra* note 226, at 225-227, for an early plea that the non-judicial powers under the original UCMJ be expanded.

²³⁸ 10 U.S.C. § 815 (1964).

²³⁹ 10 U.S.C. § 815 (a) (1964).

²⁴⁰ Ward, *supra* note 226, at 226.

²⁴¹ 10 U.S.C. § 815 (b) (1964).

²⁴² 10 U.S.C. § 815 (f) (1964).

²⁴³ Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127, 136 n.112 (1964).

²⁴⁴ 10 U.S.C. § 815 (e) (1964).

submitted that intelligent use of Article 15 by a commanding officer will, in all situations, meet the objection presented. Just as the UCMJ had no adverse effect on military discipline and morale,²⁴⁵ there is no indication that the extension of the right to counsel would have such an effect.

CONCLUSION

That those responsible for administering military justice and protecting the rights of military personnel have afforded many basic and fundamental guarantees of civilized society to the men and women of the Armed Services is evident. That, in affording these guarantees, certain practical adjustments have been necessary is equally evident. However, neither the fact that much has been done nor the fact that to do more would require further adjustment offers sufficient justification for failure to afford those who serve to defend the Constitution an essential right of the Constitution. The right to effective assistance of legally qualified counsel—guaranteed to all civilians—if denied to military personnel, belies the fact that the Constitution protects all citizens. Replacing the flexible legislative and administrative privilege of right to counsel, legal or non-legal, for servicemen with the permanent constitutional right they enjoyed as civilians bears truth to the fact that “the Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”²⁴⁶

R. J. F.

R. L. W.

²⁴⁵ Statement of Seymour W. Wurfel, *Transcript: 1966 Hearings* 330: “I personally don’t think that there has been any substantial deterioration in the overall discipline of the military establishment because of the Uniform Code. I would say that its consequences on the whole have been quite beneficial and my personal evaluation would be that the Code has not impeded the essential elements of discipline.” See also [1960] C.M.A. & JAG ANN. REP. 4.

²⁴⁶ *Ex parte* Milligan, *supra* note 225, at 120.